

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARISTA RECORDS LLC; ATLANTIC
RECORDING CORPORATION; BMG MUSIC;
CAPITOL RECORDS, INC.; ELEKTRA
ENTERTAINMENT GROUP INC.;
INTERSCOPE RECORDS; LAFACE
RECORDS LLC; MOTOWN RECORD
COMPANY, L.P.; PRIORITY RECORDS LLC;
SONY BMG MUSIC ENTERTAINMENT;
UMG RECORDINGS, INC.; VIRGIN
RECORDS AMERICA, INC.; and
WARNER BROS. RECORDS INC.,

Plaintiffs/Counterclaim Defendants,

v.

LIME GROUP LLC; LIME WIRE LLC; MARK
GORTON; GREG BILDSON, and M.J.G. LIME
WIRE FAMILY LIMITED PARTNERSHIP

Defendants.

ECF CASE

06 CV. 5936 (GEL)

**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' OBJECTIONS TO PLAINTIFFS' EXHIBITS AND
DEPOSITION EXCERPTS TO THEIR MOTION FOR PARTIAL
SUMMARY JUDGMENT AND DEFENDANTS' MOTION TO STRIKE
PLAINTIFFS' EXHIBITS AND DEPOSITION EXCERPTS**

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COME NOW, Defendants Lime Group LLC, Lime Wire LLC, Mark Gorton, and M.J.G. Lime Wire Family Limited Partnership (collectively, “Defendants”) and file this Memorandum of Law in Support of Defendants’ Objections to Plaintiffs’ Exhibits and Deposition Excerpts to Their Motion for Partial Summary Judgment and Defendants’ Motion to Strike Plaintiffs’ Exhibits and Deposition Excerpts and respectfully show the Court as follows:

I. DEFENDANTS’ OBJECTIONS TO PLAINTIFFS’ EXHIBITS

Plaintiffs’ Motion for Partial Summary Judgment relies upon numerous inadmissible exhibits. However, the Court may consider only admissible evidence in support of Plaintiffs’ Motion for Summary Judgment. *Riisna v. Am. Broad. Cos.*, 219 F. Supp. 2d 568, 571 (S.D.N.Y. 2002). Therefore, Defendants file these objections to Plaintiffs’ exhibits and move to strike them from the summary judgment record.¹ The admissibility of Plaintiffs’ Summary Judgment exhibits is properly before the Court at this stage of the proceedings. “The principles governing admissibility of evidence apply equally on a motion for summary judgment as in trial.” *Bazak Int’l Corp. v. Tarrant Apparel Group*, 378 F. Supp. 2d 377, 391 (S.D.N.Y. 2005).

Defendants object to Plaintiffs’ Summary Judgment exhibits as follows:

Exhibit No.	Exhibit Description	Objection
2	Email from M. Gorton to G. Searle	Relevance ²
13	Email from M. Kotzen to J.K. Barret	Hearsay ³
14	Slashdot	Authenticity; ⁴ hearsay; hearsay within hearsay ⁵

¹ This Motion is being filed in addition to other motions filed by Defendants addressing their objections to Plaintiffs’ summary judgment evidence.

² George Seale’s unsigned offer letter to work at Lime Wire LLC and Lime Spot LLC is irrelevant to Plaintiffs’ claims. See Section IIA *infra* for the argument and authority on relevance objections.

³ See Section IIC *infra* for the argument and authority on hearsay objections.

⁴ See Section IIB *infra* for the argument and authority on authenticity objections.

⁵ See Section IIC *infra* for the argument and authority on hearsay within hearsay objections.

Exhibit No.	Exhibit Description	Objection
15	E-mail from S. Berlin to gdf@yahoogroups	Relevance; ⁶ hearsay
17	LimeWire >> ChangeLog	Optional completeness rule ⁷
26	LimeWire: Enabling Open Information Sharing, Rolling Stones search results	Authenticity; hearsay
27	LimeWire: Enabling Open Information Sharing, The Simpsons search results	Authenticity; hearsay
31	E-mail from User to LimeWire (attaching shared directory)	Hearsay
33	E-mail from J. Dolcourt to P. Butler	Hearsay; multiple exhibits in one
35	CNET Download.com LimeWire Download Page	Authenticity; hearsay
39	E-mail from A. Harris to G. Bildson	Hearsay
42	E-mail from J. Pelzer to storedev@limewire	Relevance; ⁸ hearsay
43	Article: <i>Is LimeWire Going Legit? Not Yet</i>	Relevance; ⁹ hearsay
44	P2P Blog: <i>Limewire wants to start contextual advertising, become the Google of the P2P space</i>	Hearsay
49	Kodak Easyshare Software Download	Authenticity; hearsay
50	Screenshots of 30 Sound Recordings	Authenticity; hearsay
55	E-mail from A. Fisk to travis@redswoosh	Relevance; ¹⁰ authenticity; hearsay
63	The DCIA Conference & Exposition: P2P Media Summit LA	Hearsay
64	Article: <i>An Analysis of Internet Content Delivery Systems</i>	Relevance
65	E-mail from A. Eisgrau to list@p2punited	Relevance; ¹¹ authenticity; hearsay; hearsay within hearsay
66	Sonic Solutions Press Release: <i>Napster's Back</i>	Relevance; ¹² authenticity; hearsay

⁶ Personal posts to gdf@yahoogroups.com are irrelevant to Plaintiffs' claims.

⁷ See Section IID *infra* for the argument and authority on optional completeness objections.

⁸ Lime Wire's potential creation of a digital music store and unknown individuals' comments regarding Lime Wire are irrelevant to Plaintiffs' claims.

⁹ Lime Wire's plans to sell music are irrelevant to Plaintiffs' claims.

¹⁰ Adam Fisk's personal statements after he left Lime Wire are irrelevant to Plaintiffs' claims.

¹¹ These unauthenticated articles offering opinions on file-sharing are irrelevant to Plaintiffs' claims.

¹² This article on Napster is irrelevant to Plaintiffs' claims.

Exhibit No.	Exhibit Description	Objection
67	E-mail from M. Papish to info@mediabound	Relevance ¹³
69	E-mail chain (S. Cho to G. Bildson, et al.)	Hearsay
75	Article: <i>Online services vie to capture...Napster's users</i>	Authenticity; hearsay
77	E-mails from S. Ward to M. Gorton, et al.	Authenticity; hearsay
81	E-mail from G. Bildson to J.K. Barret	Authenticity
82	Google Customer Account Pages	Hearsay
83	E-mail from G. Bildson to everyone@mail.limepeer	Hearsay
84	Several articles including: <i>Napster surfers catch new free wave</i>	Hearsay
85	E-mail from G. Bildson to everyone@mail.limepeer	Hearsay
87	E-mail from J.K. Barret to G. Bildson	Hearsay
89	E-mail from G. Bildson to everyone@mail.limepeer	Relevance; ¹⁴ authenticity; hearsay
90	Various promotional e-mails	Authenticity; hearsay
91	PC Pitstop: <i>Napster and the File-Sharing Revolution</i>	Relevance; hearsay; authenticity
92	Appendix I: Article – <i>Napster: The Hot Idea of the Year</i>	Authenticity; hearsay
96	Several Articles Including: <i>Privacy Pillages Music Industry</i>	Authenticity; hearsay; multiple exhibits in one
97	LimeWire 2004 Marketing Plan	Authenticity
100	E-mail from D. & R. Gorton to M. Gorton	Relevance; ¹⁵ authenticity; hearsay
102	Google Customer Account Pages	Hearsay
103	Yahoo! Advertising & Marketing Correspondence	Authenticity; hearsay
105	LimeWire: The Official Site for the Fastest File Sharing Program as the Planet	Authenticity; hearsay
107	LimeWire >> Faster than Kazaa and No	Authenticity; hearsay

¹³ This article on Napster is irrelevant to Plaintiffs' claims.

¹⁴ This article describing Lime Wire and BearShare is irrelevant to Plaintiffs' claims.

¹⁵ The opinions expressed by the author of the article and David Gorton are irrelevant to Plaintiffs' claims.

Exhibit No.	Exhibit Description	Objection
	bundled Software	
110	E-mail from G. Bildson to S. Berlin, et al	Hearsay; multiple exhibits in one
114	Document by A. Harris	Hearsay
115	Transcript of G. Bildson Interview	Authenticity; hearsay; no foundation
119	French LimeWire Webpage (with Translation)	Authenticity; hearsay
122	Article: <i>LimeWire Sees Usage Surge as Morpheus Falters</i>	Hearsay
128	Handwritten Notes (G. Bildson)	Authenticity; hearsay
129	E-mail from D. Nicponski to M. Formel	Relevance; ¹⁶ hearsay
130	E-mail from D. Nicponski to M. Formel	Relevance; ¹⁷ hearsay
133	Article: <i>Leading Expert Examines Spyware and Adware in P2P Programs</i>	Authenticity; hearsay
137	E-mail from J. Watkins to J.K. Barret	Authenticity; hearsay
147	Article: <i>Tower May Go South Without Deal</i>	Relevance; ¹⁸ hearsay
149	LimeWire Pro CD Sleeve	Authenticity; hearsay
151	Document Relating to LimeWire's Conversion Into a Legitimate P2P Client	Relevance; ¹⁹ authenticity; hearsay
152	Lime Wire Music Blog	Relevance; ²⁰ authenticity
155	Lime Wire Forums >> Admin Control Panel	Relevance; ²¹ authenticity
156	Lime Wire Forums >> Banned IP Page	Authenticity; hearsay
157	E-mail from S. Berlin to K. Faaborg and ewww@limewire	Authenticity; hearsay
158	Lime Wire Forums >> Admin Control Panel	Authenticity; hearsay
159	Lime Wire Forums >> Moderator's Lounge	Authenticity; hearsay
160	Lime Wire Forums >> Moderator's Lounge	Authenticity; hearsay
161	Lime Wire Forums >> Admin Control Panel	Authenticity; hearsay

¹⁶ Meghan Formel and Dave Nicponski's opinions about Kazaa are irrelevant to Plaintiffs' claims.

¹⁷ Meghan Formel and Dave Nicponski's opinions about Kazaa are irrelevant to Plaintiffs' claims.

¹⁸ This article about Tower Records is irrelevant to Plaintiffs' claims.

¹⁹ This document regarding consequences of non-action or shutdown is irrelevant to Plaintiffs' claims.

²⁰ Live @ Limewire sessions and the concerts promoted in these articles are irrelevant to Plaintiffs' claims.

²¹ LimeWire user banning options are irrelevant to Plaintiffs' claims.

Exhibit No.	Exhibit Description	Objection
162	Lime Wire Forums >> Admin Control Panel	Authenticity; hearsay
163	Lime Wire Forums >> Private Message Board	Authenticity; hearsay
165	Lime Wire Forums >> Private Message Board	Authenticity; hearsay
167	Lime Wire Forums >> Banned IP Page	Authenticity; hearsay
168	Lime Wire Forums >> Private Message Board	Authenticity; hearsay
169	Gnutella Forums	Relevance; ²² authenticity; hearsay
170	Gnutella Forums >> LimeWire Section	Relevance; ²³ authenticity; hearsay
171	Lime Wire Forums Private Messages	Authenticity; hearsay
174	Gnutella Forums >> Lime Wire Section	Authenticity; hearsay
175	Gnutella Forums >> Lime Wire Section	Relevance; ²⁴ authenticity; hearsay
176	Gnutella Forums >> G. Bildson Profile Page	Relevance; ²⁵ authenticity; hearsay
177	Gnutella Forums >> Private Message Board	Relevance; ²⁶ authenticity; hearsay
178	Numerous Gnutella Forums >> Lime Wire Section	Authenticity; hearsay
179	Gnutella Forums >> Lime Wire Section	Authenticity; hearsay
184	Email from K. Catillaz to C. Nicponski	Hearsay; hearsay within hearsay
187	Gnutella Forums >> LimeWire Section	Authenticity; hearsay
189	Gnutella Forums >> Lime Wire Section	Authenticity; hearsay
190	Google Groups Message Board	Authenticity; hearsay
192	Gnutella Forums >> Lime Wire Section	Authenticity; hearsay
193	E-mail from A. Friedman to M. Gladys	Hearsay
194	Talking Points for G. Bildson	Hearsay
196	Article: <i>File Sharers Thrive Under RIAA Threat</i>	Authenticity; hearsay
197	Folder: Knowledge of Infringement and	Authenticity; hearsay

²² The Gnutella Forums website is irrelevant to Plaintiffs' claims.²³ The Gnutella Forums website is irrelevant to Plaintiffs' claims.²⁴ The Gnutella Forums website is irrelevant to Plaintiffs' claims.²⁵ The Gnutella Forums website is irrelevant to Plaintiffs' claims.²⁶ The Gnutella Forums website is irrelevant to Plaintiffs' claims.

Exhibit No.	Exhibit Description	Objection
	Selected Contents	
198	Article: <i>Music Industry Optimism Shaken, Rattled and Rolled</i>	Hearsay
201	Article: <i>A Supreme Court Showdown for File Sharing</i>	Authenticity; hearsay
202	Article: <i>Lime Wire's Live Wire</i>	Authenticity; hearsay
205	Gnutella Forums >> Lime Wire Section	Authenticity; hearsay
206	Yahoo! Groups—The Gnutella Developer Forum	Authenticity; hearsay
207	Yahoo! Groups—The Gnutella Developer Forum	Authenticity; hearsay
208	Yahoo! Groups—The Gnutella Developer Forum	Authenticity; hearsay
209	Yahoo! Groups—The Gnutella Developer Forum	Authenticity; hearsay
210	Yahoo! Groups—The Gnutella Developer Forum	Authenticity; hearsay
211	Sinead O'Connor Copyright Documents	Authenticity; hearsay
213	Article: <i>Lime Wire 4.0 Out Today</i>	Authenticity; hearsay
217	Apple iTunes Search Results	Authenticity; hearsay
223	LimeWire Options	Authenticity; hearsay
224	Gnutella Forums >> BearShare Section	Authenticity; hearsay
225	Lime Wire >> Support for BearShare hostiles.txt	Relevance; ²⁷ authenticity; hearsay
228	Gnutella Forums >> Lime Wire Section	Authenticity; hearsay
229	“Simpp” Related IP Addresses	Authenticity; hearsay
230	LimeWire Options	Authenticity; hearsay
231	A. Fisk Blog Post	Relevance; ²⁸ authenticity; hearsay
232	E-mail from S. Cho to A. Fisk	Authenticity; hearsay
240	E-mail from C. Rohrs to a Bang Networks employee	Authenticity; hearsay

²⁷ The opinions of Aaron Walkhouse are irrelevant to Plaintiffs' claims.

²⁸ Adam Fisk posted his comments after his employment with Lime Wire was terminated.

Exhibit No.	Exhibit Description	Objection
241	Yahoo! Groups—The Gnutella Developer Forum	Authenticity; hearsay
242	Yahoo! Groups—The Gnutella Developer Forum	Hearsay
247	Lime Wire Message Board	Authenticity; hearsay
249	E-mail from A. Fisk to S. Daswani, et al.	Hearsay
250	E-mail from S. Osokine to A. Fisk	Relevance; ²⁹ hearsay
253	E-mail from C. Rohrs to J. Chang	Hearsay
254	E-mail from C. Rohrs to R.A. Morris	Hearsay; authenticity
255	E-mail from C. Rohrs to A. Fisk	Hearsay; authenticity
257	Gnutella Forums >> Lime Wire Section	Hearsay
260	Article: <i>Will Gnutella Get Morpheus Back on Track?</i>	Authenticity; hearsay
261	Lime Wire >> Gnutella Network Good Citizen Tips	Authenticity; hearsay
264	E-mail from A. Fisk to F. von Lohman, M. Cuban, et al.	Relevance; ³⁰ hearsay
281	E-mail from G. Bildson to Flanagan@flanaganconsulting	Hearsay
286	Numerous documents re Filtering	Authenticity; hearsay; multiple exhibits in one
287	Declaration of Talmon Marco (<i>Grokster</i> litigation)	Relevance; ³¹ hearsay
288	Declaration of Talmon Marco (<i>Grokster</i> litigation)	Relevance; ³² hearsay
296	Numerous e-mails re Infringing Conduct by LimeWire Users	Relevance; ³³ authenticity; hearsay; multiple exhibits in one

²⁹ The opinions of Serguei Osokine are irrelevant to Plaintiffs' claims. Furthermore, these emails are dated after Adam Fisk's employment with Lime Wire was terminated.

³⁰ The opinions of Serguei Osokine are irrelevant to Plaintiffs' claims. Furthermore, this email is after Adam Fisk's employment with Lime Wire was terminated.

³¹ The statements and opinions of iMesh's President and Chief Marking Officer are irrelevant to Plaintiffs' claims; even more so when offered in a completely different case.

³² The statements and opinions of iMesh's President and Chief Marking Officer are irrelevant to Plaintiffs' claims; even more so when offered in a completely different case.

³³ The opinions of random users are irrelevant to Plaintiffs' claims.

Exhibit No.	Exhibit Description	Objection
297	E-mail from LimeWire User to webmaster@limewire	Hearsay
298	E-mail from LimeWire User to webmaster@limewire	Hearsay
299	Lime Wire User Testimonials	Hearsay; authenticity
300	Lime Wire User Testimonials	Hearsay; authenticity
304	E-mail from K. Kahn to ewww@limewire	Hearsay
305	E-mail from K. Kahn to ewww@limewire	Hearsay
306	E-mail from K. Kahn to ewww@limewire	Hearsay
307	E-mail from service@limewire to ewww@limewire	Hearsay
308	E-mail from service@limewire to Z. Balevsky	Hearsay
309	Weedshare Homepage	Authenticity; hearsay
313	Yahoo! Groups—The Gnutella Developers Forum	Hearsay
315	Article: <i>Peer-to-Peer File Sharing and Copyright Law After Napster</i>	Relevance; ³⁴ authenticity; hearsay

Additionally, Defendants object to the deposition testimony designated as exhibits in Plaintiffs' Motion for Summary Judgment as follows:

Deponent	Page/Line	Objection
Berlin	6:04 – 9:11	Relevance ³⁵
	26:6 – 26:17	Speculation
	217:15 – 218:9	Speculation
	243:18 – 243:24	Assumes facts not in evidence; improper opinion question from a lay witness
	247:13 – 247:23	Speculation

³⁴ The opinions of this author are irrelevant to this Lawsuit.

³⁵ Personal opinions regarding “stealing” are irrelevant to any issue in this Lawsuit.

Deponent	Page/Line	Objection
Catillaz	163:11 – 163:21	Assumes facts not in evidence ³⁶
	183:15 – 183:19	Speculation
	324:07 – 324:19	Improper lay opinion; speculation
Falco	157:23 – 158:11	Speculation; assumes facts not in evidence
Fisk	153:7 – 154:5	Speculation
A. Gorton	101:21 – 102:9	Speculation
M. Gorton	88:18 – 24	Assumes facts not in evidence; ³⁷ compound question
	484:2 – 485:21	Assumes facts not in evidence; ³⁸ speculation
	503:17 – 503:25	Argumentative; speculation
Harris	108:14 – 108:24	Overbroad, vague, speculation
Horowitz	Report	Authenticity; hearsay; no foundation
Mercurio	231:18 – 233:25	Speculation; improper foundation
	260:15 – 260:25	Speculation
D. Nicponski	61:11 – 61:21	Vague; overbroad
	136:15 – 136:25	Relevance ³⁹
	138:23 – 139:2	Speculation

³⁶ This portion of the transcript assumes that there were actual user testimonials posted in the French version of LimeWire, which Plaintiffs have not proven.

³⁷ This section assumes that infringement could have been reduced or prevented, which Plaintiffs have not proven.

³⁸ This portion of the transcript assumes that Lime Wire had to take action to comply with the *Grokster* ruling, which Plaintiffs have not proven.

³⁹ This has to do with his work at BearShare and is therefore irrelevant.

Deponent	Page/Line	Objection
	139:3 – 139:25	Relevance ⁴⁰
	142:13 – 143:25	Speculation; relevance
	161:22 – 164:25	Relevance ⁴¹
Randell	34:19 – 35:22	Speculation; hearsay; no foundation
Rohrs	97:15 – 98:18	Speculation
	112:24 – 113:06	Speculation
	119:03 – 119:21	Speculation
Rubenfeld	151:13 – 152:24	Hearsay; lay opinion
	251:18 – 252:13	Hearsay
	254:07 – 254:23	
Waterman	Report	Authenticity; hearsay; no foundation

II. ARGUMENT & AUTHORITY

A. Rules 401-403: Relevancy

“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” FED. R. EVID. 401. “Evidence which is not relevant is not admissible.” FED. R. EVID. 402. Although relevance is a liberal standard, the proponent of evidence must still prove the following: “(1) [t]he evidence must be probative of the proposition it is being offered to prove, and (2) the proposition to be proved must be one that is of consequence to the determination of the action.” *United States v. Kaplan*, 490 F.3d 110, 121 (2d

⁴⁰ This has to do with his work at BearShare and is therefore irrelevant.

⁴¹ This is his personal opinion and is irrelevant.

Cir. 2007) (quoting *United States v. Diaz*, 878 F.2d 608, 614 (2d Cir. 1989). If the proponent cannot demonstrate that the evidence is relevant, it is inadmissible. See *Santrayall v. Burrell*, 993 F. Supp. 173, 177) (S.D.N.Y. 1998) (precluding the admission of irrelevant evidence).

B. Rule 901: Authentication

Federal Rule of Evidence 901 requires authentication or identification as a condition precedent to admissibility. FED. R. EVID. 901. Rule 901(a) further requires Plaintiffs to submit sufficient evidence to support a finding that the documents on which they rely are what Plaintiffs claim that they are. *United States. v. Ruggiero*, 928 F.2d 1289, 1303 (2d Cir. 1991). Plaintiffs attempt to authenticate their summary judgment evidence via the Declaration of Katherine B. Forrest, an attorney for the law firm representing Plaintiffs. This is insufficient to authenticate the documents to which Defendants object on the basis of authenticity. Furthermore, it is questionable whether Ms. Forrest has personal knowledge sufficient to authenticate these documents.

C. Rules 801-803: Hearsay

Hearsay is not admissible pursuant to Federal Rule of Evidence 802. FED. R. EVID. 802. However, numerous of Plaintiffs' exhibits contain hearsay, out-of-court statements offered to prove the truth of the matter asserted. FED. R. EVID. 801. Furthermore, Plaintiffs have not set forth the foundation to meet any of the hearsay exceptions contained in Rule 803. FED. R. EVID. 803. By way of example, Rule 803(6) provides an exception for business records. However, to meet the business records exception, Plaintiffs must provide testimony from the custodian of records or another qualified witness demonstrating that the documents were "kept in the course of a regularly conducted business activity and also that it was the regular practice of that business activity to make the [record]." *Parker v. Reda*, 327 F.3d 211, 214-15 (2d Cir. 2003). Plaintiffs

have failed to set forth a foundation for the business record exception, or any other exception provided in Rule 803. Therefore, the documents to which Defendants object on the basis of hearsay should be excluded. Likewise, Plaintiffs' exhibits contain hearsay within hearsay and these statements do not meet the exceptions set forth in Rule 803. Therefore, the hearsay within hearsay must be excluded. FED. R. EVID. 805.

Defendants anticipate that Plaintiffs will attempt to argue that some of the statements to which Defendants object on hearsay grounds are admissions by a party-opponent. Rule 801(d)(2)(D) provides that "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship" is not hearsay. FED. R. EVID. 801(d)(2)(D). "In order to introduce evidence of an out-of-court statement as nonhearsay under Rule 801(d)(2)(D), a party must lay a sufficient foundation by establishing '(1) the existence of the agency relationship, (2) that the statement was made during the course of the relationship, and (3) that it relates to a matter within the scope of the agency.'" *Marcic v. Reinauer Transp. Cos.*, 397 F.3d 120, 129 (2d Cir. 2005) (citing *Pappas v. Middle Earth Condo. Ass'n*, 963 F.2d 534, 537 (2d Cir. 1992)). Plaintiffs have not established that the documents to which Defendants object herein are nonhearsay. Therefore, they should be excluded. *See id.*

Specifically, Exhibits 15, 55, 165, 203, 231, 250, 254, 257, 261, 264 and 313 are not party admissions. These emails and posts to various websites were not made by Lime Wire employees within the course of their employment by Lime Wire. Instead, they are personal communications expressing the authors' individual views, not those of Lime Wire, and are inadmissible hearsay. Moreover, Exhibits 55, 203, 231, 250, and 264 contain correspondence from Adam Fisk that were created after his employment with Lime Wire was terminated. Since

he was not even an employee at the time that the correspondence was drafted, these Exhibits cannot constitute an admission by a party-opponent.

D. Rule 106: Optional Completeness

Federal Rule of Evidence 106 provides that “[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.” FED. R. EVID. 106. “The Second Circuit has ‘interpreted Rule 106 to require that a document be admitted when it is essential to explain an already admitted document, to place the admitted document in context, or to avoid misleading the trier of fact.’” *United States v. Gotti*, 457 F. Supp. 2d 395, 397-98 (S.D.N.Y. 2006) (quoting *Phoenix Associates III v. Stone*, 60 F.3d 95, 102 (2d Cir. 1995)). Exhibit 17 does not include the entire fifty-three pages of the Change Log and the complete document must be included.

E. Expert Reports

Expert reports that are neither sworn nor verified are not competent summary judgment evidence. *Winstead v. Ga. Gulf Corp.*, 77 Fed. App’x 267, 271 (5th Cir. 2003); *see also Major v. Astrazeneca, Inc.*, Nos. 5:01-CV-618 (Lead) (FJS/GJD), 5:01-CV-1736 (Member) (FJS/GJD), 2006 WL 2640622, at *6 (N.D.N.Y. 2006) (stating that the report was not proper summary judgment evidence because it was not notarized or dated). The expert reports attached to the depositions of Ellis Horowitz, Ph.D. and Richard Waterman are neither sworn nor verified and are not admissible summary judgment evidence.

III. CONCLUSION

Plaintiffs' Motion for Partial Summary Judgment relies upon exhibits that are not relevant, have not been properly authenticated, and contain hearsay. The Exhibits objected to within this Memorandum of Law are inadmissible and must be excluded. Defendants request that the Court sustain Defendants' objections and grant this Motion to Strike Plaintiffs' Exhibits to Their Motion for Partial Summary Judgment and exclude Plaintiffs' Exhibits objected to herein.

Dated: September 26, 2008.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that the foregoing pleading was filed by means of the Court's ECF system on the 26th day of September, 2008. Accordingly, it is assumed that all counsel of record received notice of this filing from the ECF system. Lead counsel, listed below, will also receive a courtesy copy via email.

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